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IN THE

Supreme Court of the United States

October Term, 1972

FILED

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MICHAEL RODAK, JR., CLERK

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education of
the State of New York,

and

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGH-
LIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR
GIRLS and YESHIVAH RAMBAM,

and

SENATOR EARL W. BRIDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BEN-
JAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER,
ABYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD
M. SQUADRON,

Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

MOTION TO AFFIRM

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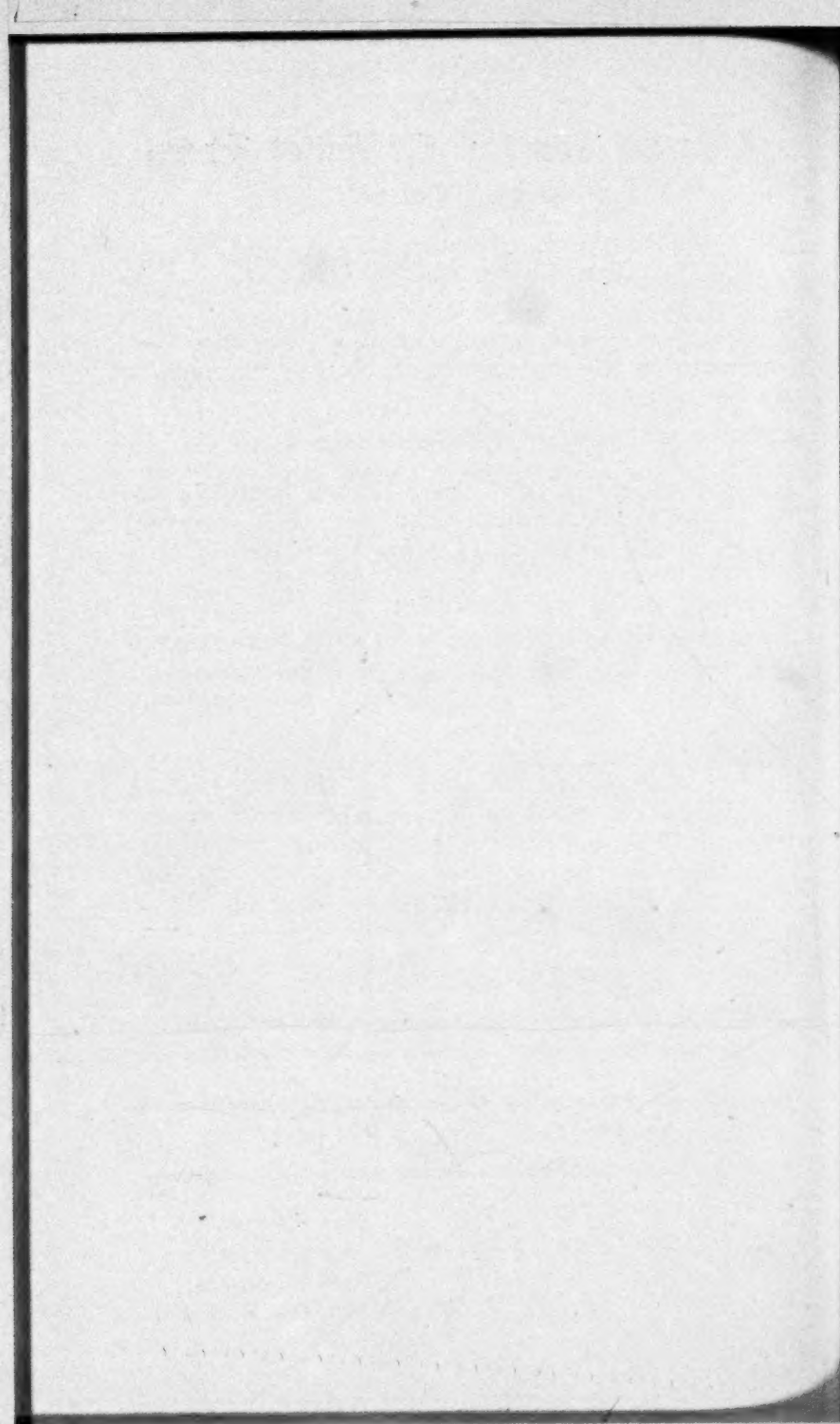


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Pursuant to Rule 16 of the Rules of this Court, the
appellees herein move to affirm the judgment of the court

below on the ground that the question upon which review is sought has been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

Question Presented

The question presented in this appeal is the constitutionality under the First Amendment of a state statute appropriating funds to be paid to nonpublic schools for expenses incurred in performing mandated services which are primarily examination and record keeping when the statute, as construed and applied by the state, includes as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Statement of the Case

The appellees accept the Statement of the Case as set forth by the appellants in their respective Jurisdictional Statements.

ARGUMENT

There is little we can add to the opinion of Judge Lasker. There is not much in the arguments in any of the three Jurisdictional Statements submitted herein which addresses itself to the reasons set forth by Judge Lasker for holding the statute unconstitutional and even less which meets these reasons. We therefore rely in the main on Judge Lasker's opinion for the argument in support of our motion to affirm. We do, however, wish to make one additional comment.

On page 18 of the New York Attorney General's Jurisdictional Statement, it is asserted that the State-required tests for which the statute provides reimbursement "are designed by the State and are the same tests provided by the State to public as well as nonpublic schools and thus are both secular and non-ideological in nature." This statement is not in accord with the facts. We respectfully call the Court's attention to page 24 of the State's Jurisdictional Statement wherein Judge Lasker shows that by the defendants' own admissions only a small part of the expenses for which money is received from the State covers the cost of services actually mandated by it. By far the greatest part of the money is used to pay for tests devised not by the State but by the schools and Diocesan authorities.* Thus, in a typical instance, the examination figure accepted by the State was \$68,853, but of this fully \$66,629, or 97%, represented the cost of school and Diocesan testing and less than 3% the cost of administering "tests provided

* This is admitted by the intervening schools' Jurisdictional Statement, p. 10, footnote 4.

by the State.” (Parenthetically, we note that in one case the State accepted as properly attributable to mandated services the sums of \$10,000 to maintain a convent and \$7,000 for Sisters’ transportation costs. Exhibit D of Answers to Interrogatories of Defendants Levitt and Nyquist, Mode I—pp. 16-17.)

Tests formulated and administered by church school authorities are not always “secular and non-ideological in nature.” A perceptive article by Professor George R. La Noue of Teachers College, entitled “‘Religious Schools and ‘Secular’ Subjects’” appearing in the Summer 1962 issue of *Harvard Educational Review* (Vol. 32, pp. 272-275, 281) shows how tests in even so value-free a subject as arithmetic can be used for religious indoctrination. The following examples come from three books published for use in church schools, two Catholic and one Protestant. (The books are: Sister M. Paulita Campbell, *Progress in Arithmetic, Grade 4* (1957); Sister Mary St. William, Sister Mary Emerentia, Sister Mary Florence, et al., *New Way in Numbers* (1961); Sidney Dystra, *Mathematics Curriculum Guide* (1958)):

How much money must I have to buy these four books? *Poems About the Christ Child*, \$1.85; *Story of Our Lady*, \$2.25; *Saint Joseph*, \$1.05; *Saint Theresa*, \$2.00.

The children of St. Francis School ransomed 125 pagan babies last year. This year they hope to increase this number by 20%. If they succeed, how many babies will they ransom this year?

David sells subscriptions to the *Catholic Digest* on a commission basis of 20%. If the subscription is \$2.50 a year, what is David’s commission on each sale?

China has a population of approximately 600,000,000. Through the efforts of missionaries 3,000,000 have been converted to Catholicism. What percentage of the people of China have been converted?

In Africa Father Murray, a Holy Ghost father, was given a triangular piece of ground upon which to build his church. What was the area of this ground if it had a base of 80 feet and an altitude of 120 feet?

* * *

Jim made the Way of the Cross. He likes the sixth station very much. What Roman numeral was written above it?

In millions of homes Our Lady's challenge has been accepted, but she wants billions throughout the world to join the Family Rosary for Peace. Do you know how to write in figures large numbers such as those just mentioned?

* * *

Why is it important to learn mathematics? Responses should relate to the idea that mathematics reveals God.

Why should a student's work be neat, accurate, and honest? Responses should relate to the idea that mathematics is a useful tool for work and service and must be done according to God's standards.

What would be the basis on which you would establish a business? Responses should relate to Christian ethics, stewardship, and usefulness.

How are number ideas used in making things? Responses should relate to mathematics as a tool for our creative activity.

How were mathematical ideas used in the creation of the world? Responses should relate to God the Creator and indicate the observation of form and order in creation.

Where does the idea of numbers come from? Responses should relate to God as the source of mathematical principles and of all knowledge.

What part did man play in revealing God through mathematics? Responses should deal with the history of the number system.

We do not know if these books are still in use in any church schools, or if they are, whether any teachers use the suggested tests and the suggested answers. But this we submit is constitutionally irrelevant, as is clear from the following quotation from the Court's opinion in *Lemon v. Kurtzman*, 403 U.S. 602 at 618-619 (1971):

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

* * *

A comprehensive, discriminating, continuing state surveillance will inevitably be required to insure that these restrictions are obeyed and the First Amendment

otherwise respected. . . . These prophylactic contracts will involve excessive and enduring entanglement between state and church.

This is exactly the situation in the present case. Even if it be assumed that a "comprehensive, discriminating, continuing state surveillance" would not be required in respect to external examinations such as those formulated by the State Board of Regents, the administration of these, as we have seen, makes up only a fraction of examination costs. Policing of school and Diocesan examinations is impossible without bringing on that "excessive and enduring entanglement between church and state" which the First Amendment forbids.

We do not mean to imply that the challenged statute would be constitutional if all the appropriated funds were allocated to the cost of administering State formulated examinations. For the reasons stated in Judge Lasker's opinion, that, too, would be unconstitutional. In addition, we would have a case of direct subsidization by the State of the necessary operations of church schools. As to this, the Court said in *Lemon*:

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. (403 U.S. at 621.)

Conclusion

The judgment of the District Court should be affirmed because its decision has rendered unsubstantial the question which the appellants ask this Court to review.

Respectfully submitted,

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September, 1972